

1. **Indhow (Migration) [2017] AATA 2450 (22 November 2017)**

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DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mrs Anab Ali Indhow

VISA APPLICANT: Master Mohamed Dahir Hassan

CASE NUMBER: 1725167

DIBP REFERENCE(S): 2016046802

MEMBER: Kira Raif

DATE: 22 November 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 101 (Child) visa:

- Public Interest Criterion 4020 for the purposes of cl.101.223 of Schedule 2 to the Regulations.

Statement made on 22 November 2017 at 10:55am

CATCHWORDS

Migration – Child (Migrant) (Class AH) visa – Subclass 101 (Child) – Bogus document – Interests of visa applicant's mother and half siblings

LEGISLATION

Migration Act 1958, s 5

Migration Regulations 1994, Schedule 2, cl 101.223, PIC4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Mudiyanselage v MIAC [2013] FCA 266

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 10 October 2017 to refuse to grant the applicant a Child (Migrant) (Class AH) visa under s.65 of the *Migration Act 1958* (the Act).
5. The visa applicant is a national of Somalia, born in November 2002. He made the application for the visa on 3 May 2016. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.101.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied the visa applicant met the Public Interest Criterion (PIC) 4020. The sponsor (the review applicant) seeks review of the delegate's decision.
6. The review applicant appeared before the Tribunal on 22 November 2017 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Somali and English languages. The review applicant was represented in relation to the review by her registered migration agent who did not attend the hearing. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

RELEVANT LAW

7. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.101.223 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
8. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B).
9. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act. In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the

reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

10. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
11. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

12. The review applicant provided to the Tribunal a copy of the primary decision. It indicates that the visa applicant stated in his application that his biological father Mohamed Dahir was missing. The visa applicant provided with his application a Kenyan Red Cross document confirming that information. The officer of DIBP conducted verification checks of this document and was advised by the Kenya Red Cross Society that the letter presented by the visa applicant was not issued by the Red Cross and is a forgery.
13. The review applicant has not provided any written submissions to the Tribunal but at the commencement of the hearing she provided a copy of the Kenya Red Cross statement indicating the father has been missing since 2010. In her oral evidence to the Tribunal the review applicant said her son had approached the Red Cross for the statement and was given that document. The review applicant said it was not her son's fault, nor his intention to provide the bogus document. The Tribunal finds the review applicant's explanation unconvincing. If the visa applicant did approach the Red Cross, it is unclear why that organisation would issue a document which they would subsequently deny issuing. The review applicant suggested the workers of the Red Cross are corrupt.
14. In any case, it is not necessary to consider whether the visa applicant intended the fraud or was actively involved in it. Having regard to the above information, the Tribunal reasonably suspects that the statement from the Red Cross which was submitted with the application is counterfeit or has been altered by a person who does not have authority to do so. The Tribunal finds it is a bogus document within the meaning of s. 5(1)(a) of the Act.
15. The Tribunal acknowledges that the review applicant presented to the Tribunal another statement from Kenya Red Cross which she claims was re-issued upon payment of a fee. The review applicant said she is not sure if it is a genuine document. The Tribunal had not sought to verify this document because, even if it is found to be genuine, it would not assist the applicant in relation to the issue at hand. If it is determined that the earlier submitted document was a bogus document, PIC 4020 would be engaged irrespective of the authenticity, or otherwise, of the newly submitted document (*Mudiyanselage v MIAC* [2013] FCA 266).
16. The Tribunal finds that there is evidence that the visa applicant has given, or caused to be given, to the Minister or an officer a bogus document in relation to the application for the visa. The Tribunal is not satisfied the visa applicant meets PIC 4020(1).

SHOULD THE REQUIREMENTS OF CL.4020(1) OR (2) BE WAIVED?

17. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
18. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
19. The applicant does not claim, and the Tribunal is not satisfied that there are compelling circumstances that affect the interests of Australia.
20. In his submission to the delegate, the visa applicant provided evidence that his step-father in Australia is undergoing cancer treatment and he stated that his mother is not able to leave Australia to care for him. The review applicant provided to the Tribunal evidence of her partner's death in October 2017.
21. The review applicant told the Tribunal that she recently lost her husband and she feels isolated. She stopped her son from going to school because she cannot afford his schooling. Her son used to go to school but this year he studies English 'on and off'. The review applicant said she came to Australia in 2011 on a Spouse visa. She did not include her son in her own application because her ex-husband did not allow the son to come to Australia. The review applicant said that the child was looked after by the paternal grandmother and after she passed away, by the review applicant's mother. The review applicant said that after the divorce in 2004, the child was taken by his father's family and she was not allowed to have any contact or communication with the child. In 2012 the paternal grandmother died and her mother took the child and since that time they resumed contact. The review applicant said she did not sponsor her son earlier because she was not an Australian citizen and a lawyer told her she had to be a citizen before she could sponsor.
22. The review applicant said she travelled overseas and spent five months with her son between 2015 and 2016. Since 2012 she has been sending money to her son each month and she also speaks to him daily. The review applicant said she had no power to be with her child before but once she was able to, she started the process to bring him to Australia.
23. Despite the absence of documentary evidence, the Tribunal accepts that at least since 2012 the child has been in the care of the review applicant's mother and that the review applicant has been providing financial and emotional support to the child. The Tribunal accepts that since that time, the review applicant and her son have developed a closer relationship and that they speak to each other frequently. The Tribunal accepts that the review applicant is experiencing hardship at present, particularly since the death of her husband in October 2017 and as a single mother with two minor children and that hardship is exacerbated by her separation from her son. The Tribunal also accepts that the visa applicant has developed a close relationship with his half-sisters in Australia and they are Australian citizens.
24. Considering all the circumstances of this case, the Tribunal has formed the view that there are compassionate or compelling circumstances affecting the interests of Australian citizens, being the visa applicant's mother and half-siblings.

25. The delegate found that even if such circumstances existed, the provision of a bogus document 'outweighed' such considerations. The Tribunal is mindful that the waiver in PIC 4020(5) is not designed to involve a weighing exercise. Either compassionate or compelling circumstances exist or they do not. The provision of a bogus document or false or misleading information engages the operation of PIC 4020, without which the waiver would not arise, but it is not correct to deny the existence of any compelling or compassionate circumstances or the existence of the waiver.
26. The Tribunal is satisfied that there are compassionate or compelling circumstances that affect the interests of Australian citizens. The Tribunal is satisfied that the requirements of cl. 4020(1) should be waived.
27. There is no evidence that the visa applicant has previously been refused a visa for failure to meet PIC 4020 and there is nothing to suggest that the visa applicant does not meet the identity requirements in PIC 4020(2A).

CONCLUSION

28. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl.101.223.

DECISION

29. The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 101 (Child) visa:
 - Public Interest Criterion 4020 for the purposes of cl.101.223 of Schedule 2 to the Regulations.

Kira Raif
Senior Member